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No.

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1985

Josephine A. Dillon, Committee of
Hilda Nadine Amidon, a legally
incompetent person,
Petitioner,

v.

Potomac Hospital Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF AMICUS CURIAE OF THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF THE PETITION

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INTEREST OF THE AMICUS CURIAE

The decision of the Virginia Supreme Court in Potomac Hospital v. Dillon, 229 Va. ___, 329 S.E.2d 41 (1985), would make settlements impossible in many areas of complex litigation facing modern courts. The practical effect of this decision on asbestos litigation, for example, would be in the words of Judge McKenzie of the Eastern District of Virginia ". . . disastrous, not only for the plaintiffs, but for this Court. . . This holding would result in a tremendous waste of resources and time for plaintiffs, defendants and the Court, as all cases would have to be tried to completion."[1] The Attorney General of Virginia files this amicus

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[1] Mann v. H. K. Porter and Southern Textile Corp., No. 83-477-N Civ. (E.D. Va. July 8, 1985) at p. 10.

brief because this potentially adverse impact of the decision below on the Commonwealth's court system is unnecessary and results from an erroneous application of constitutional principles.

Complex civil litigation more often than not involves multiple defendants in protracted and costly discovery and pre-trial procedures. The General Assembly of Virginia recognized the realities of contemporary litigation when it enacted legislation that changed the common law rule regarding the effect of releasing a joint tort-feasor. By providing that a release of one tort-feasor does not discharge those remaining from liability, the General Assembly facilitated prompt settlements. The decision below inhibits settlements and forces all parties to proceed to trial because plaintiffs cannot release willing defendants if the effect will be to absolve other nonsettling

tort-feasors from liability. It is in the interest of both protecting the exercise of proper legislative authority and avoiding the over-burdening of the court system with unnecessary litigation that the Commonwealth advances her arguments in favor of this Court granting a writ of certiorari to review Potomac Hospital v. Dillon.

SUMMARY OF ARGUMENT

At common law, the release of one joint tort-feasor released all defendants from liability. Section 8.01-35.1 of the Code of Virginia provides that release of one person does not discharge other persons unless the release so provides. The statute also provides that the settling tort-feasor is discharged from liability for contribution to other tort-feasors.

The right of contribution did not exist at common law and is created in Virginia only by this statute. It is inchoate, and does not vest until a joint tort-feasor has paid a claim for which the other joint tort-feasor is liable. First Virginia Bank-Colonial v. Baker, 225 Va. 72, 81, 301, S.E.2d 8, 13 (1983). A statute such as §8.01-35.1 may be applied retroactively when the legislature manifests this intent and it affects no contractual or vested rights. Such retroactive application does not offend due process rights guaranteed by the Constitution.

The Virginia Supreme Court's decision in Potomac Hospital v. Dillon, is contrary to well established constitutional principles. The court held that as a "substantive" right, contribution is included with vested rights as having constitutional due process protection from the application of

retroactive legislation. However, §8.01-35.1 has a rational basis in regard to its legislative purpose, to encourage settlements. Hayman v. Patio Products, Inc., 226 Va. 482, 311 S.E.2d 752 (1984). As enunciated by the United States Supreme Court, this is the sole requirement regarding substantive rights in due process cases. U.S. v. Locke, ___ U.S. ___, 105 S.Ct. 1975, 85 L.Ed.2d 64 (1985). The decision below improperly limits the power of the Virginia Legislature to passing retroactive legislation affecting procedural matters only.

The public policy of the Virginia statute, which is to encourage settlements and the efficient resolution of lawsuits, also is frustrated by the Potomac Hospital decision. Without the protection from subsequent liability for contribution, joint tort-feasors are much less likely to seek settlements. Most importantly,

plaintiffs will not agree to settle claims if the result of their settlement is to abolish their causes of action against non-settling defendants. Even if the provision in §8.01-35.1 discharging a settling tort-feasor from liability for contribution is struck, the remainder of the statute providing that release of one joint tort-feasor does not release all should be upheld.

ARGUMENT

I. THE DECISION BELOW IS AN UNPRECEDENTED RESTRICTION OF THE LEGITIMATE LEGISLATIVE POWERS OF THE VIRGINIA GENERAL ASSEMBLY, BECAUSE RETROACTIVE APPLICATION OF CODE OF VIRGINIA SECTION 8.01-35.1, WHICH AFFECTS A JOINT TORT-FEASOR'S RIGHT OF CONTRIBUTION, DOES NOT CONSTITUTE A DENIAL OF DUE PROCESS.

A. The decision below is inconsistent with decisions of the United States Supreme Court, which require only that retroactive application of statutes serve a "rational legislative purpose" to survive due process scrutiny.

The central issue presented is whether the retroactive application of § 8.01-35.1 results in an unconstitutional denial of a joint tort-feasor's right to contribution. The Act was passed in 1979 and subsection D, concerning the retroactive effect, was added in 1982.[2] The

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[2]The Code of Virginia, §8.01-35.1, reads as follows: Effect of release or (Footnote Continued)

effect of the statute is to abrogate the

(Footnote Continued)
covenant not to sue in respect to liability and contribution.

A. When a release or a covenant not to sue is given in good faith to one of two or more persons liable in tort for the same injury, or the same property damage or the same wrongful death:

1. It shall not discharge any of the other tort-feasors from liability for the injury, property damage or wrongful death unless its terms so provide; but any amount recovered against the other tort-feasors or any one of them shall be reduced by any amount stipulated by the covenant or the release, or in the amount of the consideration paid for it, whichever is the greater. A release or covenant not to sue given pursuant to this section shall not be admitted into evidence in the trial of the matter but shall be considered by the court in determining the amount for which judgment shall be entered; and

2. It shall discharge the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.

B. A tort-feasor who enters into a release or covenant not to sue with a claimant is not entitled to recover by way of contribution from another tort-feasor whose liability for the injury, property damage or wrongful death is not extinguished by the release or covenant not to sue, nor in respect to any amount paid by the tort-feasor which is in excess

(Footnote Continued)

common law rule that the release of one tort-feasor operated as a release of all tort-feasors. In the decision below, Potomac Hospital Corp. v. Dillon, 229 Va. ____, 329 S.E.2d 41 (1985), the Virginia Supreme Court held that the statute could not be applied retroactively to adversely affect the hospital's right of contribution. The Court framed its analysis broadly by determining whether the provision "violates constitutional due process."

Although the decision below is not explicit on whether it relies on the

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(Footnote Continued)
of what was reasonable.

C. A release or covenant not to sue given pursuant to this section shall be subject to the provisions of §§8.01-55 and 8.01-424.

D. This section shall apply to all such covenants not to sue executed on or about July 1, 1979, and to all releases executed on or after July 1, 1980, regardless of the date the causes of action affected thereby accrued.

Federal or State Constitution, all indications are that the decision rests upon the due process clause of the Fourteenth Amendment to the United States Constitution. None of the courts below discusses or mentions the State Constitution. All cases cited in the decision below that deal with the due process issue are grounded in the Federal Constitution. In addition, the Virginia Supreme Court has held that if an act does not violate the Federal Constitution, it will not offend the Virginia Constitution, and vice versa. Reynolds v. Milk Commission, 163 Va. 957, 963, 179 S.E. 507 (1935). Due process violations under the Virginia Constitution are subject to the same standards as under the United States Constitution. See Town of Danville v. Pace, 66 Va. (26 Gratt.) 1 (1874). Therefore, when the decision below speaks in terms of constitutionality, constitutional questions and due

process rights, it is referring to these terms as interpreted under the Federal Constitution.

The Virginia Court's expansion of the constitutional prohibition to include inchoate substantive rights as well as vested rights is inconsistent with recent statements by this Court. When faced with a due process challenge to the retroactive application of a statute in Pension Benefit Guaranty Corp. v. R. A. Gray & Comp., ____ U.S. ____, 104 S.Ct. 2709, 81 L.Ed2d 601 (1984), the Supreme Court ruled that Congress could enact a statute that retroactively affected the right to pension plan benefits because the statute served a rational legislative purpose. Pension Benefit, supra 104 S.Ct. 2709, at 2712. The right affected in the Pension case was clearly substantive as opposed to procedural. This "rational basis" analysis was also applied in U.S. v. Locke,

____ U.S. ____, 105 S.Ct. 1785 85 L.Ed.2d 64 (1985) and in National Railroad Passenger Corp. v. Atchison, Topeka and Sante Fe Railway Co., et al., ___ U.S. ___, 105 S.Ct. 1441, 84 L.Ed.2d 432 (1985). In the latter case, the United States Supreme Court reiterated this rule: "The party asserting a Fifth Amendment due process violation must overcome a presumption of constitutionality." Further, Justice Marshall, writing for the majority, quoted Pension and Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 96 S.Ct. 2882 (1976), emphasizing that the person attacking the retroactive statute must show that "the legislature has acted in an arbitrary and irrational way." National Railroad Passenger Corp., supra 105 S.Ct. 1441, at 1455.

The General Assembly of Virginia has acted rationally in enacting §8.01-35.1, which does not abolish contribution, but

in effect merely revises the method for its computation. Although the settling defendant is released from further liability, the effect of the statute is to reduce the judgment by the amount the plaintiff has already received. In addition, the major thrust of the statute is to allow plaintiffs to release one tort-feasor, without losing the right to proceed against those who choose not to settle. It is clear that the legislature sought to replace the impractical common law approach with a more rational method.

B. The right of contribution is an inchoate right, not subject to the constitutional protection afforded to vested rights.

In arriving at its decision, the Court below determined that the right to contribution is a substantive right. Potomac Hospital, supra 329 S.E.2d 41 (quoting Shiflet v. Eller, 228 Va. 115,

121, 319 S.E.2d 750, 754 (1984). The Commonwealth does not contest this designation, but respectfully submits that the Court's holding is based on an erroneous statement of the appropriate rule. As previously held by the Honorable Walter E. Hoffman, United States District Judge for the Eastern District of Virginia, a retroactive statute cannot interfere with or divest vested rights. Stancil v. United States, 200 F. Supp. 36, 44 (E.D. Va. 1961). When the legislature manifests its express intent to make a statute retroactive, however, and such application does not affect a contractual or a vested right, then it is permissible. Eaton v. Davis, 176 Va. 330, 10 S.E.2d 893 (1940); Bain v. Boykin, 180 Va. 259, 23 S.E.2d 127 (1942); Hagen v. Hagen, 205 Va. 791, 139 S.E.2d 821 (1965); 4A M.J. Constitutional Law §47 (Repl. Vol. 1983).

The right to contribution, while substantive, is clearly not vested until a disproportionate settlement or judgment is reached. First Virginia Bank - Colonial v. Baker, 225 Va. 72, 81, 301 S.E.2d 8, 13 (1983). In Laws v. Spain, 312 F.Supp 315, 318 (E.D. Va. 1970), Judge Kellam held that "the right to contribution arises when one joint tort-feasor has paid a claim for which the other joint tort-feasor is liable." In Potomac Hospital, the "cause of action" for contribution arose in 1977 at the time of the jointly negligent acts. Although derivative from the cause of action, the right of contribution did not become a vested "right of action" until the release was signed in July 1983. The vesting of the right to contribution thus did not occur until after the passage of §8.01-35.1 Subsection D, which became effective in 1982. Therefore, in the case of Potomac Hospital

there was no retroactive effect on a vested right.

C. The decision below improperly limits the prerogative of the Virginia General Assembly.

If this Court allows the Potomac Hospital decision to stand, it will significantly infringe upon the Virginia General Assembly's legitimate exercise of its legislative powers. Although the General Assembly infrequently passes laws retroactively affecting substantive rights, this body has always had the power to enact such legislation within long-observed constitutional guidelines. The Court's decision in Potomac Hospital reduces this legislative prerogative and in effect, restricts the General Assembly's ability to pass laws with retroactive application to matters only affecting strictly procedural rights.

The Potomac Hospital decision indicates that not only may the legislature not retroactively affect substantive rights by express intent, but that it cannot do so even with regard to a statutory right that does not exist except by the will of the legislature. This restriction is again contrary to the great weight of authority. See for example, the discussion in 1A Sutherland Stat. Const. §23.35 (4th Ed.), citing Baltimore and P. R. Co. v. Grant, 98 U.S. 398, 25 L.Ed 231 (1878).

Before §8.01-35.1 went into effect on July 1, 1979, a member of the General Assembly requested an opinion from the Attorney General of Virginia as to whether or not the statute would be applicable to claims that arose prior to the enactment of the statute. The Attorney General of Virginia concluded that the new statute would be applicable ". . . since such an

application would disturb no vested right and would be in accord with the rules of statutory construction." 1978-1979 Report of the Attorney General at 247.

This Court should grant the Petition for a Writ of Certiorari in order to review the decision below in light of (1) long-standing constitutional authorities to the contrary, and (2) the detrimental impact that the decision places on the well-founded legislative authority customarily and legitimately entrusted to the hands of the General Assembly of Virginia and other legislative bodies.

II. THE FAILURE TO ENFORCE SECTION §8.01-35.1 OF THE CODE OF VIRGINIA IS CONTRARY TO PUBLIC POLICY, WHICH FAVORS THE SETTLEMENT AND EFFICIENT RESOLUTION OF LAWSUITS.

Public policy in Virginia favors settlements of lawsuits. Crandell v. U.S., 703 F.2d 74, 75 (4th Cir. 1983), 4A M.J. Compromise & Settlement, §4 (Supp.

1984). Section 8.01-35.1 favors and encourages settlement by joint tort-feasors who are willing to settle out of court. See Hayman v. Patio Products, Inc., 226 Va. 482, 311 S.E.2d 752 (1984). Thus, plaintiffs are able to settle with willing defendants without fear of thereby releasing other recalcitrant or culpable defendants from liability. This encourages settlement of lawsuits and judicial economy, especially in increasing areas of complex litigation involving multiple parties.

The intent of the drafters of the law on which the Virginia statute is based was to encourage settlements. Uniform Contribution Among Tort-Feasors Act §4, Commissioner's Comment, 12 U.L.A. 98-99 (1955). This also was the intent of the Virginia General Assembly since passage of the statute abrogated the common law rule that release of one tort-feasor is a release of

all. The statute provides a benefit to the plaintiff by enabling him to continue his efforts against non-settling tort-feasors. The settling tort-feasor is benefited in that he is immune from further contribution.

The common law governing federal cases regarding the release of joint tort-feasors is in line with Virginia's statute. The well-established approach was applied in a recent case in the United States District Court for the Eastern District of Va., Mann v. H. K. Porter and Southern Textile Corp., No. 83-477-N Civ. (E.D. Va. July 8, 1985). The Court ruled that under federal common law, release of one defendant does not release all. Mann, supra at p. 10. In addition, the Court took the opportunity to discuss the Virginia statute in light of Shiflet and Dillon, by noting that the right of contribution, although derivative from a

cause of action, is an inchoate right. Further, the opinion contains strong language concerning the public policy behind the federal common law rule:

> . . . [T]he practical effect of adopting defendants' argument [supporting the release of remaining tort-feasors after release of one] would be disastrous, not only for plaintiffs, but for this Court. In addition to the obvious inequity of requiring dismissal of all current cases when a plaintiff had settled with at least one defendant, despite such result being exactly contrary to all parties' intentions, a holding such as the defendants suggest would make settlements in future asbestos cases impossible... This holding would result in a tremendous waste of resources and time for plaintiffs, defendants and this Court, as all cases would have to be tried to completion.

Mann, supra at 13.

The failure to enforce §8.01-35.1 is clearly at odds with public policy in Virginia as enunciated by the legislature and, in addition, is contrary to the approach favored by the federal courts in

the Fourth Circuit. Many complex claims in the area of antitrust, asbestos and other toxic torts or environmental areas arose prior to the enactment of Section 8.01-35.1. The inability to reach reasonable settlements with individual defendants in these cases will force unnecessarily expensive, protracted and burdensome trials on the courts of this Commonwealth. This result is not intended or required by the sound and well-established principles of constitutional law.

III. ASSUMING A DUE PROCESS VIOLATION IS FOUND, SECTION 8.01-35.1 OF THE CODE OF VIRGINIA IS ONLY PARTIALLY INVALID AND THE REMAINDER OF ITS PROVISIONS, WHICH PROMOTE SETTLEMENT OF COMPLEX LITIGATION, SHOULD STAND.

A. Striking the portion of the statute concerning the retroactive discharge of contribution does not prevent the statute from accomplishing its purpose of encouraging settlement of lawsuits.

The major concern of the Court in the decision below was its conclusion that the retroactive application of §8.01-35.1 was unconstitutional to the extent that the rights of joint tort-feasors to contribution from the settling tort-feasor would be abridged. This "abridgement" results from the interaction of Code §8.01-35.1.A(2), which discharges the settling tort-feasor from "all liability for contribution to any other tort-feasor", and §8.01-35.1.D which gives this section its retroactive effect.

Assuming that the retroactive appli-

cation of that portion of the statute which abridges other tort-feasors' rights of contribution is unconstitutional, this portion may be struck while the remainder of §8.01-35.1, which provides that the release of one does not release all, remains in effect. The United States Supreme Court has recognized that a statutory provision is presumed severable if what remains after severance is fully operative as law. Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 103 S.Ct. 2764, 2775 (1983).

If the invalid provision is severable from the remainder of the statute, it may be ignored as long as the remaining portions are sufficient to accomplish their purpose in accordance with the legislative interest. It is only when the void portion is the inducement to the passage of the act or is so interwoven in its texture as to prevent the statute from

becoming operative in accordance with the will of the legislature that the entire statute is invalid. King v. County of Arlington, 195 Va. 1084, 81 S.E.2d 587 (1954), Hannoboss v. Maryland Casualty Co., 169 Va. 559, 194 S.E.2d 808 (1938).

B. Failure to allow the remainder of the statute to stand reinstates the common law rule that the legislature intended to abrogate.

In the absence of a severability provision in the statute, the burden of proving severability devolves upon the supporter of the legislation. Nevertheless, even in the absence of a severability clause, "the test of severability is whether the legislature would be satisfied with what remains after the invalid part has been eliminated." City of Portsmouth v. Citizens Trust Co., 216 Va. 695, 698, 222 S.E.2d 532, 535 (1976). The Commonwealth asserts that the legislature is

more satisfied with the remaining provisions previously mentioned than the harsh common law rule where "there is an obvious lack of sense and justice in a rule which permits the entire burden of a loss for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone according to the plaintiff's whim". W. PROSSER, Handbook of The Law of Torts §46, at 291 (4th Ed. 1971).

By ruling invalid the provision which discharges the tort-feasor's liability from contribution, §8.01-35.1.A(2), the benefit provided the plaintiff remains. The plaintiff can still proceed against other tort-feasors. Therefore, the statute continues to encourage settlements.

The central provision regarding release should not fall victim to the Court's decision that secondary aspects of

the statute are invalid. A statute may contain constitutional and unconstitutional provisions that may be perfectly distinct and separable so that some may stand and others may fall; and if, when the unconstitutional portion of the statute is rejected, the remaining portion reflects the legislative will, is complete in itself, is capable of being executed independently of the rejected portion, and in all other respects is valid, such remaining portion will be upheld and sustained. Delardas v. County Court, 217 S.E.2d 75 (W.Va. 1975), see also, Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 103 S.Ct. 2764, 2775 (1983). Whether a statute contains a saving provision or not, the test of its separability is the interest of the lawmakers. Hannoboss, supra at 571. The intent of the lawmakers, in reversing the harsh common law rule, was to allow for

settlement without extinguishing a plaintiff's rights against other tort-feasors. This is still provided by the remainder of §8.01-35.1, and accordingly, it should be upheld.

CONCLUSION

It is on the basis of these arguments that the Commonwealth joins the petitioner in requesting that a writ of certiorari be issued to review the judgment and opinion of the Virginia Supreme Court.

Respectfully submitted,

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